UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GULF COAST REBAR, INC.

and **Cases 12-CA-149627**
12-CA-149943
IRON WORKERS REGIONAL DISTRICT COUNCIL, INTERNATIONAL UNION OF BRIDGE, STRUCTURAL, ORNAMENTAL AND REINFORCING IRON WORKERS, AFL-CIO **12-CA-150071**
12-CA-151050
12-CA-151091

Caroline Leonard, Esq. **and** ***Christopher Zerby, Esq.***,
for the General Counsel.
James Allen, Esq., of Villa Hills, KY, for the
Respondent.
Michael A. Evans, Esq., ***(Hartnett Gladney Hetterman, LLC)***,
of St. Louis, MO, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. Respondent repudiated an 8(f) collective-bargaining agreement during its term, but more than 6 months before the filing of any unfair labor practice charge. Because Section 10(b) barred proceeding on this withdrawal of recognition, Respondent did not violate Section 8(a)(5) when it later refused a union information request. Respondent admitted certain other violations alleged in the complaint.

Procedural History

This case began on April 7, 2015, when the Charging Party, the Iron Workers Regional District Council, affiliated with International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO (the Union), filed a charge against Respondent, Gulf Coast Rebar, Inc., in Case 12-CA-149627.

On April 13, 2015, the Union filed a charge against Respondent in Case

12-CA-149943. The Union amended this charge on July 15, 2015.

On April 14, 2015, the Union filed a charge against Respondent in Case 12-CA-150071. It amended this charge on July 15, 2015.

On April 28, 2015, the Union filed charges against Respondent in Cases 12-CA-151050 and 12-CA-151091 and amended each of these charges on July 15, 2015.

On July 31, 2015, the Regional Director for Region 12, acting for and with authority delegated by the Board's General Counsel, issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (the Complaint). Respondent filed an Answer and Affirmative Defenses on August 13, 2015, an Amended Answer and Affirmative Defenses on December 6, 2016, and a Second Amended Answer and Affirmative Defenses on December 12, 2015.

On December 15, 2015, a hearing in this matter opened before me in Tampa, Florida. During the hearing, the General Counsel orally moved to amend complaint paragraphs 5(c), 9(d), and 12, and I granted that motion.[1] Complaint paragraph 12, as amended, alleges that "by the conduct described above in paragraphs 9(a) through 9(d), Respondent has been discriminating in regard to the hire and tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act." After all parties had the opportunity to present evidence, the hearing closed on that same date. Thereafter, all parties filed briefs, which I have carefully considered.

Admitted Allegations

Respondent's Second Amended Answer and Affirmative Defenses (for brevity, the Answer) admitted a number of allegations. Additionally, it entered into a written stipulation which was placed in the record as a joint exhibit. Based on those admissions, I find that the General Counsel has proven the allegations in complaint paragraphs 1(a) through (i), 2(a) through (c), 4, 5(a) and (b), 6(a) through (c), 7(a) through (c), 8(a) through (e), 9(a) through (d), 10(a) through (c), 11, and 12.

More specifically, I find that the Government has proven that the Union filed and served the charges as alleged.

Further, I find that at all times material to this case, Respondent has been a contractor in the construction industry engaged in the installation of rebar, that it performed this work at various jobsites in Florida and Georgia, and that it has an office and place of business in

[1] As amended, complaint par. 5(c) alleges that "from on or about February 11th, 2008 to present, based on Section 9(a) of the Act, the Union has been the limited exclusive collective bargaining representative of the unit."

Complaint par. 12, as amended, alleges that "by the conduct described above in par. 9(a) through (d), Respondent has been discriminating in regard to the hire and tenure of terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Sec. 8(a)(1) and (3) of the Act. "

Jacksonville, Florida. Additionally, I conclude that Respondent, a Florida corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that it is appropriate for the Board to assert jurisdiction in this matter.

Respondent also has admitted, and I find, that its president and owner, Chad Jones, and its operations manager, Mike Adams, are its supervisors and agents within the meaning of Section 2(11) and (13) of the Act.

Based on Respondent's admission of the allegations in complaint paragraph 5(a), I find that the following employees constitute a unit appropriate for collective bargaining (the unit) within the meaning of Section 9(a) of the Act:

> All employees performing craft work within the geographical areas stated in Article XXI of the collective-bargaining agreement between Respondent and the Union working in connection with field fabrication, handling, racking, sorting, cutting, bending, loading and unloading, hoisting, placing, burning, welding and tying of all materials used to reinforce concrete construction; realigning of reinforcing iron, wire mesh placing, bricking, pulling and similar reinforcing materials, placing steel dowels as well as refastening and resetting same while concrete is being poured; reinforcing steel and wire mesh in roadway and sidewalks in connection with building construction; the handling or placing of "J" or Jack bars on slip form construction, the placing of all clips, bolts and steel rods and wire fabric or mesh pertaining to gunite construction, the placing of steel-tex or paper- back mesh used primarily for reinforcing and placing wire mesh to reinforce gypsum roof construction; post tensioning: all loading and unloading, hoisting, placing and tying of all post tensioning cables, wrecking of cones, wedging of the tendons, stressing, cutting and repairing; any other work related to the above work; and any work assigned and agreed-upon on a specific jobsite.

Respondent also has admitted the allegations in complaint paragraph 5(b). Therefore, I find that on March 13, 2009, it entered into a collective-bargaining agreement with the Union whereby it recognized the Union as the exclusive collective-bargaining representative of the employees in the unit described above without regard to whether the Union's majority status had ever been established under Section 9(a) of the Act. On its face, this agreement was effective during the period from February 11, 2008, to February 10, 2012. However, it also provided that it would renew automatically each year thereafter unless timely written notice was given in accordance with the terms of article XXII of the collective-bargaining agreement.

Respondent has admitted all allegations raised in complaint paragraph 6. Accordingly, I find that on or about April 13, 2015, Respondent, by Mike Adams, at its Boggy Creek, Florida jobsite: (a) threatened employees with closer than normal supervision and discharge because of their membership in and activities on behalf of the Union; (b) told employees that Respondent does not recognize the Union and that they could not inform other employees of the identity of the union steward; and (c) told employees that they should not report

grievances about their working conditions to the Union. Moreover, based on Respondent's admission of the allegations in complaint paragraph 11, I conclude that this conduct interfered with, restrained, and coerced employees in the exercise of their Section 7 rights, and thereby violated Section 8(a)(1) of the Act.

Respondent also has admitted all allegations raised in complaint paragraph 7. Therefore, I find that on or about April 14, 2015, the Respondent, by Mike Adams, at its Poinciana, Florida jobsite: (a) threatened to engage in a physical altercation with employees and threatened employees with discharge because of their membership in and activities on behalf of the Union; (b) physically assaulted its employees because of their membership in and activities on behalf of the Union; and (c) falsely reported to police that employees had physically assaulted him because of the employees' membership in and activities on behalf of the Union.

Based on Respondent's admission of the allegations in complaint paragraph 11, I conclude that this conduct interfered with, restrained, and coerced employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act. Additionally, based on Respondent's admission of the allegations in complaint paragraph 12, I conclude that by engaging in this conduct, Respondent discriminated in regard to the hire and tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization, in violation of Section 8(a)(1) and (3) of the Act.

Respondent also has admitted the allegations raised in complaint paragraphs 8(a), (b), and (c). Based on these admissions, I find that on or about April 17, 2015, Respondent, by Mike Adams, at its Poinciana, Florida jobsite: (a) threatened employees with discharge unless they removed union stickers from their hardhats; (b) removed union stickers from employees' hardhats; and (c) told employees that Respondent would not recognize the Union. As Respondent also admitted, I find that this conduct violated Section 8(a)(1) of the Act.

Complaint paragraph 8(d) alleges that on or about April 17, 2016, Respondent, by Mike Adams, its Poinciana, Florida jobsite, created an impression among its employees that their union activities were under surveillance by Respondent. Respondent's answer stated:

> Respondent admits to the actions alleged in the paragraph but has insufficient knowledge as to the impressions of others concerning those actions. Respondent, despite its specific lack of knowledge concerning the impressions of others, admits the alleged actions may have caused employees to reasonably possess the impression they were under surveillance by Respondent.

In view of this admission and Respondent's admission of the allegations in complaint paragraph 11, I find that Respondent engaged in the conduct alleged in complaint paragraph 8(d) and thereby violated Section 8(a)(1) of the Act.

Respondent has admitted that, as alleged in complaint paragraph 8(e), on about April 17, 2015, at its Poinciana, Florida jobsite, Operations Manager Mike Adams threatened employees with discharge and unspecified reprisals if they engaged in union activities.

Respondent has further admitted, as alleged in complaint paragraph 11, that it thereby violated Section 8(a)(1) of the Act. I so find.

Respondent has admitted all allegations set forth in complaint paragraph 9 and its various subparagraphs. It also has admitted the legal conclusions alleged in complaint paragraphs 11 and 12. Based on those admissions, I find that: (a) on about April 13, 2015, Respondent discharged its employee Colby Lee; (b) on or about April 14, 2015, after reinstating Lee, Respondent isolated Lee from its other employees; (c) that by this conduct and the conduct alleged in complaint paragraphs 7(a) through (c), Respondent caused the termination of Lee's employment on about April 14, 2015. Further, I conclude that Respondent thereby violated Section 8(a)(1) and (3) of the Act.

Based on Respondent's admission of the allegations in complaint paragraph 10(a), I find that since on or about March 23, 2015, the Union has requested in writing that Respondent furnish the Union with the following information:

> (1) Identify all current employees of the Company. For each such employee, identify his/her: (a) name, (b) job classification, (c) address, (d) phone number, (e) date of birth, (f) email address, and (g) date of hire.
>
> (2) Identify all employees of the Company for the period of January 1, 2011 to the present. For each such employee, identify his/her: (a) name, (b) job classification, (c) address, (d) phone number, (e) date of birth, (f) email address, (g) date of hire, and (h) date of termination (if applicable);
>
> (3) Identify each project where the Company is currently performing work. For each such project, identify: (a) the address of the project, (b) the general contractor on the project, (c) all entities with which the Company has contracted to perform work on the project, (d) the type of work performed by the Company on the project, (e) the date the project began, (0 the date the project is expected to conclude, and (g) the dollar value of the Company's work on the project.
>
> (4) Identify each project where the Company has performed work for the period of January 1, 2011, to the present. For each such project, identify: (a) the address of the project, (b) the general contractor on the project, (c) all entities with which the Company has contracted to perform work on the project, (d) the type of work performed by the Company on the project, (e) the date the project began, (f) the date the project concluded (if applicable), and (g) and the dollar value of the Company's work on the project.

Complaint paragraph 10(b) alleges that this requested information is necessary for and relevant to the Union's performance of its duties as the exclusive collective-bargaining representative of the unit. Respondent admits this allegation and I so find. Respondent also has admitted the allegations in complaint paragraph 10(c). Therefore, I find that since about March 23, 2015, Respondent has failed and refused to furnish the Union with this requested

information.

However, Respondent has denied the allegation, in complaint paragraph 13, that its failure and refusal to furnish the Union with this requested information violates the Act. That legal issue turns on whether, at that time, Respondent had a duty to provide the information. Whether such a duty existed depends on whether the Union then was the exclusive bargaining representative of the unit of Respondent's employees, an allegation that Respondent denies. That issue will be discussed below.

Labor Organization Status

Complaint paragraph 3(a) alleges that, at all material times, the Iron Workers' Regional District Council has been a labor organization within the meaning of Section 2(5) of the Act. Complaint paragraph 3(b) alleges that at all material times, Local 846, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO (Local 846) has been a labor organization within the meaning of Section 2(5) of the Act. Complaint paragraph 3(c) alleges that at all material times, Local 846, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO (Local 846) has been a labor organization within the meaning of Section 2(5) of the Act.

Although Respondent's answer did not admit these allegations, at hearing Respondent stipulated that "the Regional District Council and Locals 846 and 847 of the International Union of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, AFL-CIO, are organizations that exist for the purpose of dealing with employers concerning terms and conditions of employment, including by negotiating contracts and by processing grievances." Additionally, Respondent stipulated "that employees participate in the Regional District Council, Locals 846 and 847 as members by attending meetings and by voting on officers and proposals."

Based on Respondent's stipulations and the record as a whole, I conclude that the General Counsel has proven the allegations raised in complaint paragraphs 3(a), (b), and (c). Therefore, I find that Locals 846 and 847, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO and the Iron Workers' Regional District Council are labor organizations within the meaning of Section 2(5) of the Act.

The 8(a)(1) and (3) Allegations

Respondent has admitted all of the independent 8(a)(1) allegations and all of the 8(a)(1) and (3) allegations alleged in the complaint. Because Respondent has admitted, in each such instance, both the alleged conduct and the legal conclusion that the conduct violated the Act, no further discussion is necessary, except for the allegations raised in complaint paragraph 6(b).

Complaint paragraph 6(b) alleges that on about April 13, 2015, Respondent told employees that Respondent does not recognize the Union and that they could not inform other employees of the identity of the union steward. For the reasons discussed below, I have

concluded that Respondent did not have a duty to recognize the Union on March 23, 2015, when the Union made an information request, and for those same reasons Respondent did not have a duty to recognize the Union later. Under these circumstances, the April 13, 2015 statement that Respondent did not recognize the Union does not interfere with, restrain, or coerce employees in the exercise of Section 7 rights. Therefore, I do not recommend a remedy for this conduct, even though Respondent has admitted it thereby violated the Act.

Although I conclude that Respondent did not violate Section 8(a)(1) by telling employees on April 13, 2015, that it did not recognize the Union, I conclude that the other conduct alleged in complaint paragraph 6(b), prohibiting employees from informing other employees of the "identity of the union steward" does interfere with, restrain, and coerce them in the exercise of Section 7 rights. Even if there were no union steward on the jobsite, there well might be an employee seeking to persuade others to join and support the Union or with other ties to the Union and employees reasonably would understand the prohibition to include speaking with that person about the Union. Applying an objective standard, I conclude this statement, which restricted employee discussion of union-related matters, reasonably would chill the exercise of Section 7 rights and therefore violated Section 8(a)(1). Moreover, Respondent has admitted that the alleged conduct violated that section. Therefore, I have included a reference to this violation in the recommended Order and in the notice to employees.

The 8(a)(5) Allegations

Respondent has admitted all facts necessary to establish that it violated Section 8(a)(1) and (3) of the Act as alleged in the complaint. The remaining issues concern whether Respondent acted lawfully when it failed and refused (as it has admitted) to furnish information requested by the Union.

The 8(f) Agreements

This case focuses on a bargaining relationship which arose under Section 8(f) of the Act, a provision which applies to the building and construction industry but not to other employers. Therefore, the following background may be helpful.

In general, the Act imposes on an employer the duty to recognize and bargain with a union when it represents a majority of the employees in a unit appropriate for collective bargaining. Section 9(a) of the Act makes such a union the exclusive representative of those employees. It states:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted,

> without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided* further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a).

Except in the construction industry, an employer that recognizes a union which has *not* been designated or selected by a majority of bargaining unit employees thereby violates the Act. However, the fluidity of work in the construction industry makes application of this principle difficult. A construction contractor bids on projects at many different locations. If awarded a contract, the employer typically hires workers for that particular project, their employment ending when the job is completed.

Accordingly, Congress included in the Act an exception which allows a construction contractor to enter into an agreement with a union which does not then represent a majority of employees in an appropriate unit. This exception makes it easier for a contractor to obtain skilled workers when it begins a project at a new location and increases the employment opportunities for such workers. The exception appears in Section 8(f) of the Act, which begins as follows:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement. . . .

29 U.S.C. § 158(f).

However, when a construction industry employer signs a prehire agreement with a union pursuant to this exception, that recognition does not create a permanent bargaining relationship surviving the expiration of the contract. Thus, there are significant differences between the status of a union entitled to recognition because it enjoys the support of a majority of bargaining unit employees (a "9(a)" union) and one recognized under the 8(f) exception.

When a collective-bargaining agreement expires, a 9(a) union enjoys a presumption that a majority of employees continue to support it and thus remains the exclusive bargaining representative absent proof to the contrary. In contrast, a union recognized pursuant to the 8(f) exception never had to establish its majority support, and its status as exclusive

bargaining representative expires with the contract.[2]

An Employer's Duty to Furnish Information

For purposes of administering the collective-bargaining agreement during its term, it does not matter whether an employer recognized the union pursuant to Section 8(f) or 9(a). In either case, the employer has a duty to furnish the exclusive representative with requested relevant information which the union needs to perform its function. The difference is that an 8(f) union's entitlement to the information ends when the contract expires because, at that point, the 8(f) union stops being the employees' exclusive representative.

If a collective-bargaining agreement includes a clause providing for automatic renewal under certain circumstances. In the present case, the collective-bargaining agreement does have such a provision, quoted in full below, which extends the contract for an additional year unless Respondent gives the kind of notice it specifies. The General Counsel argues that Respondent failed to satisfy the notice requirements, which kept the contract alive and, along with the contract, the Union's status as exclusive bargaining representative.

The Government contends that, because of these extensions of the contract's term, it remained in effect on March 23, 2015, when the Union made the information request described above under "Admitted Allegations." Because the contract remained alive, the Government argues, so did the Union's status as exclusive bargaining representative and, therefore, its entitlement to receive the information it had requested. Therefore, under the General Counsel's theory, Respondent's refusal to furnish the information breached its duty to bargain with the Union and violated Section 8(a)(5) of the Act.

As discussed above, Respondent has admitted that the Union made the alleged information request, has admitted that the requested information is necessary for and relevant to the Union's performance of its duty as exclusive bargaining representative, and also has admitted that it has failed and refused to furnish the information. Thus, Respondent has admitted all but one of the elements necessary for the General Counsel to prove a violation of Section 8(a)(5).

However, Respondent denies that the collective-bargaining agreement remained in effect at the time the Union made the information request, and denies that the Union remained the exclusive bargaining representative. To prove a violation, therefore, the General Counsel must establish by a preponderance of the evidence that the collective-bargaining agreement survived its stated expiration date of February 10, 2012, by extending itself automatically, and again extended itself automatically in February 2013, February 2014, and February 2015.

[2] Because the 8(f) union and the 9(a) union possess essentially the same authority as exclusive bargaining representative during the term of the contract, the 8(f) union sometimes is said to have "limited" 9(a) status. A union recognized pursuant to Sec. 8(f) can attain full 9(a) status by securing the support of a majority of bargaining unit employees, but the Government does not make such a claim in the present case. Rather, complaint par. 5(c), as amended at the hearing, alleges that "based on Section 9(a) of the Act, the Union [was] the limited exclusive collective bargaining representative of the Unit."

In addition to denying that the contract remained in effect, Respondent also has raised a timeliness defense based on the 6-month limitation in Section 10(b) of the Act. It bears the burden of proving that the unfair labor practice charges were not timely.

Did the Agreement Renew Automatically?

Respondent has admitted that on about March 13, 2009, it entered into a collective-bargaining agreement with the Union. The agreement includes the following provision, article XXII, which specifies the effective dates and what notice is necessary to terminate the contract:

DURATION AND TERMINATION

> Section 1. This Agreement shall become effective on February 11, 2008 and remain in full force and effect until midnight of February 10, 2012, and, unless written notice is given by either party to the other by certified or registered mail at least four (4) months prior to such date of a desire for change or termination, this Agreement shall continue in effect for an additional year thereafter. In the same manner, this Agreement, with any amendments thereof, shall remain in effect from year to year thereafter, subject to termination at the expiration of any such contract year upon notice in writing given by either party to the other at least four (4) months prior to the expiration of such contract year. Any such notice as provided for in this Section, whether specifying a desire to terminate or to change at the end of the current contract year, shall have the effect of terminating this Agreement at such time.

Based on this language, I conclude that the collective-bargaining agreement could not be terminated before midnight of February 10, 2012. To cause it to be terminated at that time, Respondent had to give notice before midnight, October 10, 2011. Moreover, such notice had to be by certified or registered mail.

If Respondent failed to give such notice by October 10, 2011, then the collective-bargaining agreement would extend itself automatically for another year, that is, it would continue in effect until February 10, 2013. To terminate the agreement on that date, Respondent had to give notice, by registered or certified mail, no later than October 10, 2012. Absent such notice, the contract again would extend itself for a year, remaining in effect until February 10, 2014. On that date, the agreement either would extend itself automatically until February 10, 2015, or else would expire, depending on whether or not Respondent had given the prescribed notice by October 10, 2013.

If the agreement remained in effect until February 10, 2015, and Respondent had failed to give the prescribed notice by October 10, 2013, then the contract would again extend itself automatically for a year.

The complaint alleges that Respondent began violating Section 8(a)(5) on March 23, 2015, the date the Union made the information request described above. Therefore, the Government must prove that the collective-bargaining agreement remained in effect on that date. If the agreement had expired before March 23, 2015, then the Union no longer was the exclusive bargaining representative when it made the information request and Respondent had no duty to furnish the information.

Thus, the General Counsel bears the burden of proving that the collective-bargaining agreement automatically extended itself for a year on February 10, 2012, that it again extended itself automatically for a year on February 10, 2013, that it extended itself automatically for another year on February 10, 2014, and that on February 10, 2015, it again extended itself for a year. If any one of these contract extensions did not occur, then the agreement expired before March 23, 2015, and the Union was not the exclusive bargaining representative on that date.

The Benefit Fund Contributions

The complaint does not allege that Respondent violated the Act by failing to make payments to fringe benefit funds as required by the collective-bargaining agreement. However, a dispute about benefit fund payments did arise between the Union and Respondent, and the events in that dispute have some relevance in deciding whether Respondent ever gave sufficient notice to terminate the contract. The facts surrounding this dispute also have relevance to Respondent's 10(b) defense.

The collective-bargaining agreement which Respondent signed in March 2009 obligated it to make payments to fringe benefit trust funds.[3] It appears that Respondent made such payments through May 2009 but not thereafter.

The trust funds filed a lawsuit against Respondent in the United States District Court for the Northern District of Illinois. On December 20, 2010, the trust funds and Respondent entered into a settlement agreement which ended this litigation. The settlement provided that Respondent would pay to the trust funds a total of $13,710.59 "representing principal due of $10,473.53 for the period of June 2009 through July 2009, plus interest."

Crediting the testimony of the Union's regional district council president, Stephen Parker, I find that Respondent has not made any payments to the trust funds for any month after July 2009.

Respondent presented evidence that it tried to terminate the collective-bargaining agreement. Respondent's president, Chad Jones, testified as follows:

[3] Art. XVII required Respondent to make payments to the Rebar Retirement Plan and Trust (a pension fund), to the Local 846 Rebar Welfare Trust (health and welfare plan), to the Local 846 Vacation Trust (vacation plan), and to the Local 846 Training Trust (apprentice and journeyman training plan).

Q. BY MR. ALLEN: What is your understanding of how to terminate the contract according to this—

MS. LEONARD: Objection, Your Honor. The witness' understanding is not relevant.

JUDGE LOCKE: Overruled. You may answer.

THE WITNESS: Yes, sir. You have to send a letter certified 120 days before the expiration of the contract.

Q. BY MR. ALLEN: Did you ever send such a letter?
A. Yes.

Q. When did you send that letter?
A. 2009—10/2009.

Q. When in 2009?
A. Ten.

Q. What date in 2009?
A. 10/15/2009, I believe.

Q. October 15th, 2009?
A. Uh-huh.

Q. Did you send that letter by certified mail?
A. No, sir.

Q. Why didn't you send that by certified mail?
A. I just—I just overlooked the contract, just sent it.

The Union denies that it received this October 15, 2009 letter. In any event, it is clear that such a letter could not prevent the contract from renewing automatically on its expiration date, February 10, 2012, because Jones did not send it by certified or registered mail, as the contract required.

Respondent introduced a copy of this October 15, 2009 letter into evidence. It is not addressed to either Local 846 or Local 847 and also is not addressed to the Iron Workers' Regional District Council. Rather, the letter is addressed to the "Regional District Council Training Trust." It states:

To Whom It May Concern:

This letter is to inform you in writing that due to the downfall in the economy;

> we are no longer in need of the services provided by the Local 846 Union. According to contract agreement, we are to give you 30 day notice of termination of agreement.

The reference to "30 day notice" is puzzling because the collective-bargaining agreement required 4 months' notice, not 30 days. It may be that Respondent executed a separate document with the benefit trust fund and that such an agreement required a 30-day notice to terminate. In any event, the fact that Jones addressed the letter not to the Union but to a benefit fund leads me to conclude that it did not constitute, and Jones did not intend it to constitute, the notice required to terminate the collective-bargaining agreement.

As noted above, the Union denies receiving the October 15, 2009 letter and the record raises some doubts about whether Jones really sent it. For one thing, Respondent did not produce this letter in defending against a Federal lawsuit filed by the Union in May 2011 or in a related arbitration hearing which took place on January 7, 2014. Since it was in Respondent's interest to produce the letter at that hearing, Respondent's failure to do so allows the possibility that the letter did not then exist.

Jones offered a rather vague explanation that the Federal Bureau of Investigation had impounded the letter in connection with some sort of investigation[4] but I found this testimony unilluminating and not very convincing.

Jones claimed that he later enclosed a copy of this October 15, 2009 letter with another letter which he mailed to Local 846 on February 10, 2010.[5] However, the letter itself bears a date of February 19, 2010. It states:

> Enclose [sic] are the reports forms that justify the sum of, $14,320.87. Please advise me if this total is accurate, so we can fulfill our obligations to the Local 846 Union. If there are any outstanding contributions that are due please advise me in writing within (7) seven days.

This letter neither mentions termination of the collective-bargaining agreement nor indicates that an earlier letter, seeking to terminate the agreement, was enclosed. Nonetheless, Jones claims that he did enclose a copy of the earlier October 15, 2009 letter.

Jones sent this package by certified mail, return receipt requested, with restricted delivery to "Steve Parker." The envelope bears a stamp, presumably placed there by a Postal Service employee, indicating that someone had refused receipt.

The reason for the refusal is not entirely clear. Delivery of the certified letter was restricted to Parker, himself, so it is possible that he was not available to sign for it when it

[4] The record does not establish whether the FBI was investigating Respondent, the Union, or some other person or entity.

[5] The letter is addressed to the attention of "Steve Parker." Although his title does not appear on the letter, Parker is the president of the Union's regional district council.

arrived. It is also possible that someone on Parker's staff refused service because the letter had been sent with insufficient postage.

Because the Union refused receipt of the February 19, 2010 letter, it is not necessary to credit or discredit Jones' testimony that he enclosed with that letter a copy of the earlier October 15, 2009 letter. However, there are some reasons to doubt this testimony.

For one thing, the latter makes no reference to an October 15, 2009 letter. Moreover, the February 19, 2010 letter gives no indication of any intent to terminate the contract. If anything, the brief text of that letter would be consistent with an intent to comply with the terms of the collective-bargaining agreement. Nothing in the letter conveys a message that Respondent would not be making further payments in the future, in accordance with the contract's terms.

The inconsistencies in Jones' testimony (for example, his testimony that he sent the February 19, 2010 letter on February 10) and the vagueness of Jones' explanation concerning the letter being impounded by the FBI, lead me to believe his testimony is not as reliable as that of Stephen Parker. Crediting the latter, I conclude that the Union did not receive the October 15, 2009 letter either in October 2009 or later in February 2010.

The Union placed in evidence a letter dated February 18, 2010, purportedly from Jones, as Respondent's president, to Local 846 and to the attention of Parker. This letter, however, is unsigned. Parker testified that the Union did not receive it until a June 30, 2015 mediation meeting related to the Federal lawsuit discussed below.

It would have been in Respondent's interest to introduce this February 18, 2010 letter at the January 7, 2014 arbitration and its failure to do so raises doubt not dispelled by Jones' nebulous testimony concerning an FBI impoundment. Moreover, this letter, or at least the copy in evidence, bears no signature. In sum, credible evidence does not establish that Respondent sent the February 18, 2010 letter to the Union on that date and I conclude that it did not.

As discussed above, the record does not establish that Respondent made payments to the fringe benefit trust funds for any month after July 2009. On May 31, 2011, the Union and the trust funds filed a lawsuit, seeking such payments from Respondent, in the United States District Court for the District of Oregon.

On October 18, 2011, Respondent's attorney, Dale J. Morgado, sent a letter to Iron Workers Local 846 and Iron Workers Local 847. It stated:

> My client, Gulf Coast Rebar, Inc., through its President, Chad Jones, sent you a termination letter several months ago terminating the contract dated March 13, 2009, between your Locals and his company, which is the subject of the current lawsuit pending before the United States District Court for the District of Oregon, Case No. 3:11-CV-658. We deny the legality of this contract and

> believe it to be void, nevertheless, this letter is to affirm that which my client has already done and to the extent a court deems it not to be void we immediately terminate it. If you have questions, don't hesitate to contact me. Thank you.

Although this October 18, 2011 letter referred to a "termination letter" which Respondent's president sent to the Union "several months ago," the president of the Union's regional district council, Stephen Parker, testified that the Union never received that earlier letter.[6]

The Union's attorney, James R. Kinney, replied to Morgado in a letter dated February 10, 2012. This reply referred to Morgado's client as "Gulf Coast Placers," the name Respondent used when it first began doing business. The letter stated:

> Your October 18, 2011 letter purporting to terminate your client, Gulf Coast Placers' collective bargaining agreement with Regional Local Union No. 486 and 847, has been forwarded to me for response. My clients have no record of a prior attempt by your client to terminate the contract. In addition, your letter is ineffective to terminate the contract, inasmuch as it fails to comply with the requirements of Article XXll of the Agreement.
>
> Therefore, the Unions consider the collective bargaining agreement to remain in full force and effect. If you have contrary information showing that you or your client have actually complied with the requirements of the collective bargaining agreement with respect to termination, please forward it to me.

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[6] Parker testified as follows:

Q. Okay. Did the RDC or the locals ever receive such a letter as referenced here in the letter?
A. No.

Q. Okay. Did you review your files after you received this letter in 2011?
A. Yes.

Q. Did you find anything?
A. No.

Q. Did you have the locals review their files—
A. Yes.

Q. — in 2011? Did they find anything?
A. No.

Q. Did you review your files again in preparation for this hearing?
A. Yes.

Q. And did you find any letters from Chad Jones—
A. No.

> My client reserves the right to take any and all available action, to include the filing of a Grievance, Unfair Labor Practice, or a claim in U.S. District Court.
>
> Please feel free to contact me should you have any questions regarding this matter.

Although the letter stated that the Union "reserves the right to take any and all available action, to include the filing of a . . . claim in U. S. District Court," the Union and the benefit trust funds already had taken that step.

They based the lawsuit on provisions the collective-bargaining agreement requiring Respondent to make the specified payments. The agreement also included a dispute-resolution provision. Article IX established a procedure, culminating in arbitration, to decide questions about the contract's interpretation and application. Respondent moved to compel such arbitration and the court, on October 22, 2012, granted this motion.

On January 7, 2014, the Union and Respondent participated in a hearing conducted by Arbitrator William P. Hobgood. The arbitrator issued a decision on April 9, 2014.

The parties in the present case disagree concerning the arbitrator's holding. The General Counsel and the Union argue that, at least implicitly, the arbitrator held that Respondent continued to be bound by the collective-bargaining agreement. Respondent counters that the arbitrator did not address the issue.

Resolving this question requires a close examination of the arbitral award. In that decision, Arbitrator Hobgood defined the issue as follows:

> ISSUE
>
> Did the Employer violate ARTICLE XVII FRINGE BENEFIT FUNDS, ARTICLE XVIII IMPACT[7] and ARTICLE XIX DUES CHECK-OFF of the March 13, 2009 Collective Bargaining Agreement between the Grievant and the Employer? If so, what is the appropriate remedy?

(Capitalization and underlining as in original.)

This framing of the issue does not specifically focus on the existence or nonexistence of a collective-bargaining agreement. However, it is clear that the Union, at least, presented this issue to the arbitrator. Thus, in describing the positions taken by the parties, the

[7] Art. XVIII of the collective-bargaining agreement required Respondent to the Ironworker Management Progressive Action Cooperative Trust, a nonprofit fund for "improvement and development of the Ironworker Industry."

arbitrator's decision states:

> The Union also contends, contrary to the Company's assertion to the contrary, that the CBA is still in effect because it has never been properly terminated by the Company. The Union points to Article XXII which requires that written notice of termination must be given by certified or registered mail at least four (4) months prior to the expiration date. If notice is not given, argues the Union, the contract rolls over for another year. The Company was given notice that the CBA remains in full force and effect.

However, the arbitrator's decision does not indicate that Respondent made the opposite argument, namely, that it had given sufficient notice and therefore the contract had not renewed automatically. Rather, it appears that, during the arbitration, Respondent argued that the contract had not been valid at *any* time, not even when first signed. Thus, the arbitrator's summary of Respondent's arguments includes the following:

> The second argument advanced by the Company asserts the CBA [collective-bargaining agreement] executed by Chad Jones was procured by fraud, duress and misrepresentation. The Company argues that the Union *misrepresented the terms of the agreement, tried to bribe him, and finally using threats of violence to his person and business before he'd sign the contract*. The Company points to the unavailability of CBA required bylaws at the time Grievant was presented the CBA for his signature. The Company points to the testimony of Ran Brest who stated that the Union *offered him the world* [referring to the day of the CBA signing he felt scared an Chad Jones] *I know they offered him the world, I was there*. Jones testified that on the day of the signing he felt scared and [sic] intimated.

(Italics in original; footnotes omitted.)

The arbitrator summarized other arguments advanced by Respondent but none concerned the automatic renewal provision in the collective-bargaining agreement. Additionally, although the Union raised this issue, the arbitrator's decision did not address it.

Rather, the award focuses on the fact that, in Federal court, Respondent had moved to compel arbitration. Thus the arbitrator's decision states:

> It is uncontested that the Company requested the Federal District Court of Oregon order arbitration in this matter. It is also clear from the record that the Court granted the Company's request. The Company's request for arbitration and participation in this arbitration is an acknowledgement by the Company that this matter is properly before the arbitrator for a decision on its merits under the CBA [collective-bargaining agreement].

Similarly, at another point the decision states:

> The Company's request of the court to order arbitration, which was granted by the court, is essentially a validation of the CBA. This validation is further reinforced by the Company's initial adherence to its provisions.

Thus, the arbitrator treated the matter as an "either/or" issue: Either the collective-bargaining agreement was valid or it was not. The arbitrator then concluded that Respondent conceded the validity of the agreement by invoking its arbitration provision.

However, the issue before me concerns the duration of the agreement rather than its validity. The Union filed the lawsuit in 2011, during the original term of the collective-bargaining agreement, which did not expire until February 10, 2012. Even if Respondent's motion to compel arbitration conceded that this contract was valid and binding, it did not concede that the contract had renewed itself automatically.

The court granted Respondent's motion to compel arbitration on October 22, 2012, which was after the original expiration date of the collective-bargaining agreement. Conceivably, therefore, the arbitrator might have some arguable basis to conclude that Respondent waived the right to contest that the contract had extended itself automatically, for 1 year, on February 10, 2012. Logically, though, Respondent's motion to compel arbitration neither admitted nor could be deemed to admit that the agreement *again* automatically extended itself a year later, on February 10, 2013. Similarly, Respondent's resort to arbitration would not concede that the collective-bargaining agreement had extended itself once more on February 10, 2014.

Any conclusion about how much Respondent owed to the trust funds would rest, in part, on a conclusion about the duration of the contract. The agreement required Respondent to make certain payments each month, so the total amount owed would depend on how long the contract remained in effect. Therefore, if the arbitrator made a determination concerning how much Respondent must pay, he necessarily would have made a decision about whether the contract had extended itself automatically.

The arbitrator defined the issue to include "what is the remedy?" Nonetheless, he did not order Respondent to make any payments to the trust funds. Rather, the arbitral award stated: "Grievance sustained. Company is directed to submit to an audit to determine all dues and assessments owed from the period August 2009 to the present."

Arguably, this language might be interpreted in two different ways. On the one hand, ordering an audit from August 2009 to the present might imply that the arbitrator decided that the contract was in effect during this entire period. On the other hand, the arbitrator made no finding that Respondent owed payments for any specific month or number of months. In the absence of such a finding, the issue of liability remains open and awaits the information which the audit would produce.[8] It is true that the arbitrator ordered an audit for the period

[8] I reject the argument, in the Charging Party's brief, that "the arbitration award conclusively found that

August 2009 "to the present" but ordering an audit is not the same as making a specific finding that the collective-bargaining agreement bound Respondent for that entire period. In sum, I reject the issue preclusion argument (whether called collateral estoppel or otherwise). Instead, I conclude that neither the arbitrator's award nor the District Court's confirmation of it forecloses the Board from deciding issues related to the validity and duration of the collective-bargaining agreement.

Based on the arbitrator's entire decision, I cannot conclude that he considered the issue of whether the contract automatically extended itself. Although the Union raised the issue and, presumably, argued that such an extension occurred, the arbitrator did not discuss the matter or express any conclusion about the merits of the Union's argument. Thus, the arbitrator did not make any ruling on this issue which would guide or bind in the present case.[9]

Therefore, I must interpret the language in the collective-bargaining agreement to the limited extent necessary to resolve the unfair labor practice issue. Article XXII of that agreement provides for the automatic, one-year extension of the contract on February 10, 2012, and every successive February 10 thereafter "unless written notice is given by either party to the other by certified or registered mail at least four (4) months prior to such date of a desire for change or termination. . ."[10]

The record does not establish that Respondent ever gave a notice to terminate the agreement by registered or certified mail, as required. By its terms, the contract would have extended itself in 2012, 2013, 2014, and 2015 and therefore would have been in effect on

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the collective bargaining agreement is still in effect." The arbitrator held that Respondent's motion to compel arbitration signified that the matter "is properly before the arbitrator for a decision on its merits." The arbitrator also called the motion to compel arbitration a "validation" of the collective-bargaining agreement.

However, the arbitrator's use of the term "validation" must be understood in context. From Federal Magistrate Judge John V. Acosta's review of the arbitrator's decision it becomes clear that Respondent vigorously advanced the argument that the Union's claim should be rejected because it had failed to comply with the earlier, prearbitration steps of the grievance procedure. The arbitrator held, in effect, that Respondent had waived this procedural argument by moving to compel arbitration.

The arbitrator's finding that the matter was "properly before the arbitrator for a decision on the merits" and that Respondent's motion to compel arbitration effected a "validation" addresses Respondent's procedure objection but does not, in my view, constitute a finding that the agreement remained in effect. Moreover, this finding does not constitute a conclusion that the contract was *still* in effect. At most, it signified that the agreement had been in effect at some time.

[9] Even should I assume, for the sake of analysis, that the arbitrator had decided that the contract had extended itself until February 10, 2015, it would fall short of resolving the 8(a)(5) issue here. The complaint alleges a violation beginning on March 23, 2015. Respondent's refusal to furnish the information requested on that date would not violate the Act unless the collective-bargaining agreement remained in effect on that date. The contract would have had to extend itself again on February 10, 2015, which was well after the arbitrator issued his decision.

[10] The second sentence of art. XXII, sec. 1 also addresses contract termination but omits the requirement that such written notice be made by registered or certified mail. However, reading that sentence together with the next sentence, which refers to "such notice as provided for in this Section," leads me to conclude that the contracting parties intended the registered or certified mail requirement to apply to all notices of termination.

March 23, 2015, when the Union made the information request. However, before reaching such a conclusion, I will consider Respondent's argument that it repudiated the agreement.

The Repudiation Defense

Respondent asserts that it repudiated the collective-bargaining agreement at some point more than 6 months before the filing of the first unfair charge in this matter. It argues that this repudiation may have occurred as early as February 2010 but, in any event, no later than October 2011.

The Charging Party's brief counters that the repudiation defense is unavailable:

> The collective bargaining agreement between the parties is a construction industry 8(f) agreement which is currently in effect. A party may not lawfully repudiate an 8(f) agreement during the life of the agreement. See, e.g., *Adobe Walls, Inc.*, 305 NLRB 25, 27 (1991) ("[A]n employer . . . may not lawfully repudiate an 8(f) contract during its term"); *Neosho Const. Co., Inc.*, 305 NLRB 100, 101 (1991) ([A]n employer may only repudiate an 8(f) relationship on the expiration of the existing collective-bargaining agreement.").

The Charging Party, citing case authority that a party may not lawfully repudiate an 8(f) agreement during its term, argues that because of the automatic renewal provisions in the collective-bargaining agreement, it never expired. Because it never expired, it never lawfully could be repudiated. Therefore, the Charging Party asserts, the repudiation defense is not available.

However, stating that the contract never *lawfully* could be repudiated still leaves open the possibility that it might *unlawfully* be repudiated. An action can be unlawful yet still have an effect.

When an employer or union commits an unfair labor practice and someone files a charge within 6 months, the Board can order the offending party to undo the damage and post a notice informing employees that it won't happen again. In the case of an employer unlawfully repudiating a collective-bargaining agreement, resulting in withdrawal of recognition from a union, the remedy would include a requirement that the employer recognize the union and restore the agreement.

However, in general (and with some nuances and exceptions), if someone waits more than 6 months before filing the charge, a statute of limitations precludes the Board from prosecuting, resulting in the unfair labor practice going unremedied, the same as if a charge had not been filed at all.

This statute of limitations appears in Section 10(b) of the Act[11] and Respondent has raised it as an affirmative defense. In its brief, Respondent argues that it repudiated the agreement more than 6 months before April 7, 2015, the date of the first unfair labor practice charge:

> GCR [Gulf Coast Rebar] affected a complete repudiation of the Agreement and its relationship with the union no later than December 2010. Under well-established Board case law, when a union has clear and unequivocal notice that an employer has repudiated its Agreement, the Union is required to file an Unfair Labor Practice Charge within the 10(b) period following such notice.

The Respondent further argues, in effect, that because the Union did not file an unfair labor practice charge within 6 months of the repudiation, and cannot now challenge the lawfulness of that action, it also is too late to challenge the result of that action, namely, the absence of a collective-bargaining relationship. Respondent's brief further states:

> The Board has held that when a union receives clear and unequivocal notice of repudiation of a collective bargaining agreement that the union must file an unfair labor practice within the 10(b) period. 29 U.S.C. § 160(b); *A & L Underground*, 302 NLRB 467, 470 (1991). The holding in *A & L Underground* further indicates that absent a filing within the 10(b) period an employer is free to change terms and conditions of employment even including recognition of a different union if it so chooses. *A & L Underground*, 302 NLRB at 468.

The Government disputes that Respondent's actions amounted to the clear repudiation required by *A & L Underground*. The General Counsel's brief states:

> Respondent argues that it repudiated the 8(f) contract and that it is now too late to challenge that repudiation. Respondent's main citation in support of this proposition is *A & L Underground*, 302 NLRB 467 (1991). In *A & L Underground*, the union was aware of the employer's belief that the collective bargaining agreement was for a single project, rather than a term of years, and that the employer had ceased complying with the terms about two years before it filed a charge alleging repudiation, without its taking any action to enforce or police the contract in the intervening time. The Board did note the distinction between material breaches, such as failing to make trust fund payments, and total repudiation, which requires "a clear and unequivocal intention to

[11] Sec. 10(b) of the Act provides, in part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge." 29 U.S.C. § 160(b).

> repudiate" the contract, and held that only the latter is to be used to date the beginning of the 10(b) period. 302 NLRB at 469, citing *Farmingdale Iron Works*, 249 NLRB 98, 98 (1980).

The General Counsel argues that Respondent's conduct, which included a failure to make trust fund payments, only amounts to a material breach of the contract and not total repudiation.[12] Although this argument has some theoretical appeal, I do not believe it consistent with Board precedent. Rather. I conclude that an 8(f) agreement can be repudiated during its term, albeit unlawfully. The Board has authority to order a remedy for such a violation if a charge has been filed within the 6-month period prescribed in Section 10(b) of the Act. The Government discounts the significance of the October 18, 2011 letter from Respondent's attorney, Morgado, which stated, "We deny the legality of this contract and believe it to be void. . .to the extent a court deems it not to be void we immediately terminate it." The General Counsel's brief states:

> [N]o subsequent letters were sent that clearly and unequivocally asserted repudiation. None of Respondent's three Answers to the complaint alleged repudiation as an affirmative defense. [GCX 1(dd), 1(ii), and 1(jj)]. The Union's first clear and unequivocal notice that Respondent was contending that it had repudiated the contract by its refusal to fulfill its obligations under the contract may not have occurred until Respondent's opening argument at the hearing on December 15, 2015.

Contrary to the General Counsel, I conclude that the Union had ample notice that Respondent was repudiating the contract. This notice began with the October 18, 2011 letter sent to the Union by Respondent's attorney, Dale Morgado. Credible evidence does not establish that the Union received earlier notice, but receipt of Morgado's October 18, 2011 letter is not in dispute.

Based upon my observations of the witnesses, I believe the testimony of the Regional District Council's president, Stephen Parker, is reliable and credit it. That testimony

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[12] The *A & L Underground* case also is inapposite, the Government asserts, because the Union in the present case made much more diligent efforts, even filing lawsuits, to enforce the collective-bargaining agreement. However, I believe the *A & L Underground* decision does not turn on a union's general vigor but rather on whether it filed a charge within the 6-month period. Thus, in *A & L Underground*, the Board stated: "We find that the policies underlying Section 10(b) are best effectuated by requiring a party, in order to avoid the time-bar, to file an unfair labor practice charge within 6 months of its receipt of clear and unequivocal notice of total contract repudiation." 302 NLRB at 468.

However, the Union's diligence would be relevant to the following argument: It is not merely unlawful to repudiate an 8(f) agreement during its term but impossible. The agreement is indestructible and only ends when it expires or when it is abandoned. The Union's persistent efforts to enforce the agreement demonstrate that the Union had not abandoned it.

Although this argument has some theoretical appeal, I do not believe it is consistent with Board precedent. Rather. I conclude that an 8(f) agreement can be repudiated during its term, albeit unlawfully. The Board has authority to order a remedy for such a violation if a charge has been filed within the 6-month period prescribed in Sec. 10(b) of the Act.

establishes that the Union received Morgado's letter sometime around October 18, 2011. The Union's attorney replied to it of February 10, 2012.

Morgado's letter stated that several months earlier, his client sent a letter terminating the contract. Whether or not the Union received such a letter, Morgado's reference to it makes clear that Respondent intended to terminate the contract.

As discussed above, Morgado's October 18, 2011 letter stated, "We deny the legality of the contract and believe it to be void, nevertheless, this letter is to affirm that which my client has already done and to the extent a court deems it not to be void we immediately terminate it." That language is clear and unequivocal.

It is true that this letter spoke of terminating the contract and did not use the word "repudiate."[13] However, the letter should not be considered in isolation but together with circumstances which shed light on its import. These circumstances indicate that Respondent had a consistent intent, over a long period, to sever completely its relationship with the Union. That is, they showed that Respondent was not simply an "on-again-off-again" employer that sometimes wanted a relationship with the Union and sometimes did not.

In not a few instances, an employer's failure to make benefit fund payments can be attributed to financial problems or other difficulties and does not indicate an intention to abandon the employer's relationship with the union. The spirit is willing, so to speak, but the cash is weak. However, in Respondent's case, the spirit was unwilling, and consistently so.

The illuminating facts involve more than a mere arrearage in benefit fund payments. Respondent's conduct indicated that it wanted nothing at all to do with the Union. Thus, Regional District Council President Parker testified as follows on cross-examination:

> Q. Did Gulf Coast as an entity approach the Union to use JATC members?
> A. I trained Chad OSHA 30, Chad Jones through the JATC apprenticeship program.
>
> Q. If you can just answer my question. I'll rephrase more clear. Since December 2010, has Gulf Coast approached the Union to use the JATC or any other training resources?
> A. No.
>
> Q. Since December 2010, has Gulf Coast used any hiring hall provisions of the contract?
> A. No.

[13] Likewise, the union attorney's February 10, 2012 reply did not speak of repudiation. Rather, it stated that Respondent had not complied with the contractual requirements for terminating the agreement and therefore it remained in effect.

This shunning of the Union, together with Morgado's terminate-the-contract language, sent a signal of repudiation when the Union received Respondent's attorney's October 18, 2011 letter. The considerable length of time during which Respondent had made no payments at all to the trust funds, together with the fact that Respondent did not use the Union's apprenticeship program or hiring hall, made the message in Morgado's October 18, 2011 letter unmistakable. Therefore, I conclude that when the Union received the letter in mid-October 2011, it had clear and unequivocal notice of Respondent's intent to repudiate the collective-bargaining agreement, and at this point the 6-month 10(b) period started to run. *Park Inn Home for Adults*, 293 NLRB 1082 (1989).

However, even if the Union received less than the necessary clear and unequivocal notice of repudiation in mid-October 2011, the position taken by Respondent at the January 7, 2014 arbitration hearing removed any doubt. At that hearing, as the arbitrator's decision reported, the Respondent asserted that the collective-bargaining agreement signed by Jones "was procured by fraud, duress and misrepresentation. The Company argues that the Union *misrepresented the terms of the agreement, tried to bribe him, and finally us[ed] threats of violence to his person and business before he'd sign the contract*. . .Jones testified that on the day of the signing he felt scared and intimated." (Italics in original.) The word "intimated" appears to be a typographical error and I infer from context that the arbitrator meant "intimidated."

Thus, in addition to the earlier indications of repudiation, including Respondent's October 18, 2011 letter purporting to terminate the agreement, the Union now heard Respondent tell the arbitrator that the Union had resorted to fraud, duress, misrepresentation, and threats of violence to secure Jones' signature on the agreement. Moreover, the Union heard Jones testify that he felt scared when he signed it. Obviously, a contract procured by such criminal conduct would be void from the start.

Such strong accusations convey more than an intent to terminate the collective-bargaining agreement. They reflect a desire to disclaim and repudiate the bargaining relationship from its very beginning. Respondent's statements at the January 7, 2014 hearing, considered together with the October 18, 2011 letter from Respondent's attorney, Respondent's failure to abide by the contract's terms and its failure to use the Union's apprenticeship program and hiring hall, communicate a clear and unequivocal repudiation of the contract and of the bargaining relationship. I conclude that no further statement was necessary to place the Union on clear and unequivocal notice of the repudiation.[14]

Accordingly, even if the 10(b) period did not begin to run in mid-October 2011, when

[14] In sum, I conclude that Respondent did not have to use the specific word "repudiate" because, in light of its previous conduct, accusing the Union of misrepresentation, duress, bribery, and threats of violence communicated that message clearly and unequivocally. My reasoning may be illustrated by this thought experiment: Suppose that I asked someone "do we have a deal?" In this hypothetical he replies, "You, sir, are a lowdown thieving skunk so shameless you'd steal your grandma's pet duck!" After those words, would it really be necessary to seek a clarification by saying, "Yes, but do we have a deal?" Respondent's accusations were similarly extreme and reasonably would be understood, in context and without further clarification, to repudiate any bargaining relationship.

the Union received Respondent's lawyer's letter, it certainly did begin on January 7, 2014, which still was more than 6 months before the filing of the first charge in this proceeding. In reaching this conclusion, I necessarily reject the conclusions which the General Counsel would draw from the arbitration.

After the Union filed its lawsuit against Respondent in the United States District Court in Oregon, Respondent moved to compel arbitration. The General Counsel argues that this motion vitiated any effects of the October 18 termination letter because the motion manifested a belief by Respondent that the collective-bargaining agreement remained in effect. The General Counsel's brief states:

> Even if Morgado's October 18, 2011 letter (GCX 3) could somehow be considered notice of Respondent's intent to repudiate the contract, Respondent's motion to compel arbitration occurred sometime in the next year and after the contract renewed for the first time, and shows that Respondent considered the terms of the contract to be in effect. Respondent's action of seeking to compel arbitration pursuant to the terms of the contract conclusively establishes that any earlier attempt to repudiate was ineffective, and that Respondent knew it.

However, for reasons discussed above, I do not conclude that Respondent's motion to compel arbitration signified either that it believed the collective-bargaining agreement was still in effect or that the motion had the legal effect of reviving that contract. Additionally, I conclude that Arbitrator Hobgood's statement about the motion being a "validation" of the contract was a narrow holding in response to Respondent's argument that the Union was not entitled to relief because it had failed to take the initial, prearbitration steps specified in the agreement's grievance procedure. See footnote 8, above. Arbitrator Hobgood rejected that argument but his language was inartful. Magistrate Judge Acosta's review of the decision criticized the less-than-thorough discussion:

> The question of whether Gulf Coast's seeking referral of this action to arbitration waived its right to object to the Union's failure to comply with the grievance procedure in the Agreement is a question of procedural arbitrability to be decided by the arbitrator. The record reveals the parties argued this issue before, during, and after the hearing, placing the issue clearly before Hobgood. Despite the emphasis placed by the parties on this issue, and the importance of the issue to the resolution of the parties' claims, Hobgood barely addressed the issue in Award, obliquely referencing the three-step grievance procedure in the Agreement and stating his conclusion in the most general terms. The court does not agree with Hobgood's conclusion nor does it condone the cursory manner in which he addressed the issue, nonetheless, the court must afford Hobgood's decision on procedural arbitrability the extreme deference required by governing precedent. That said, the Award does address the issue and is consistent with existing law which requires an arbitrator to consider allegations of waiver, delay, or similar defenses to arbitration. Consequently, the Award

was not made in manifest disregard of the law.

In these circumstances, I conclude that the arbitrator's reference to "validation" does not amount to a finding that the agreement was in effect at the time of the arbitration hearing. An arbitration to determine liability under a contract does not have to take place during the term of that agreement because the agreement's expiration does not necessarily extinguish claims which arose during its term.

Moreover, it concerns me that the principle advocated by the General Counsel could restrict a party's ability to defend against a contractual claim by citing another provision in the same agreement. In fairness, a party should be able to say "the contract you cite is not valid, but even if it were valid, here is why it would not create the liability you claim."

The General Counsel's argument, however, implicates more than fairness. Federal policy strongly favors arbitration. To require a party to waive a defense as a condition of arbitration would discourage rather than encourage use of this forum. Increasing the price of arbitration in this manner would impede the Federal policy in its favor.

For all these reasons, I reject the General Counsel's argument. Instead, I conclude that Respondent's motion to compel arbitration neither conceded that the collective-bargaining agreement remained in effect nor waived its right to contest the validity of that agreement.

In sum, I conclude that Respondent placed the Union on clear and unequivocal notice that it was repudiating the collective-bargaining agreement, that the Union received this notice in mid-October 2011 but in any event by January 7, 2014. It then had 6 months in which to file an unfair labor practice charge. *A & L Underground*, 302 NLRB 467 (1991), citing *Desks, Inc.*, 295 NLRB 1 (1989); *Teamsters Local 43 v. NLRB*, 825 F.2d 608, 616 (1st Cir. 1987); *AMCAR Div., ACF Industries*, 234 NLRB 1063 (1978), enfd. as modified 596 F.2d 1334, 1351-1352 (8th Cir. 1979).

Because the Union did not file an unfair labor practice charge within the 6-month period specified by Section 10(b), it cannot challenge the lawfulness of the repudiation. Because of this repudiation, the Union was not the exclusive bargaining representative of any of Respondent's employees when it made the information request on March 23, 2015. Therefore, Respondent did not violate Section 8(a)(5) by refusing the furnish the Union with the requested information.

Examining the facts from the standpoint of remedy leads to a similar conclusion: Respondent's refusal to furnish the information requested on March 23, 2015, did not constitute a remediable violation of the Act.

Section 8(a)(5) of the Act makes unlawful an employer's refusal to bargain in good faith but not all violations involve an outright withdrawal of recognition. An employer can commit several types of 8(a)(5) violations while still recognizing a union as its employees' exclusive representative. For example, it can violate Section 8(a)(5) by refusing to provide

requested relevant information, by unilaterally changing working conditions without notifying and bargaining with the union, or by skipping the union and dealing directly with its employees. So long as the employer continues to recognize the union, each such violation can be remedied by ordering the employer to stop to undo the damage and to post a notice.

However, the 8(a)(5) violation alleged in this case cannot be remedied in this manner. It resulted from a massive earlier violation of Section 8(a)(5), the withdrawal of recognition, which lies untouchable in the pre-10(b) past. If the Union had filed a charge within 6 months of the contract's repudiation, the Board could have ordered Respondent to undo the unlawful withdrawal of recognition and to bargain with the Union. However, the Union did not file such a charge and the 10(b) "statute of limitations" precludes the Board from ordering that remedy now. In the absence of an order to recognize and bargain with the Union, an order to furnish information would do no good.

The Union requested the information to better perform its representation function. Ordering Respondent to furnish the information would result in a meaningless act if the Union has no representation function to perform.

In other words, to remedy the refusal to furnish information, Respondent also must remedy the earlier withdrawal of recognition. Yet, Section 10(b) precludes the Board from ordering Respondent to undo that earlier violation.

For all the reasons discussed above, I recommend that the Board dismiss the 8(a)(5) allegations.

Remedy

Respondent, having violated Section 8(a)(1) and (3) of the Act, must take all actions necessary to fully remedy those unfair labor practices. These actions include posting the notice to employees attached to this decision as "Appendix A" at the locations described below. At each such location, Respondent must post both English and Spanish versions of the notice.

Respondent, as a contractor in the construction industry, establishes jobsites at various locations and later closes those jobsites when the work is completed. Because of frequent changes in the number of employees at the location of their work, to assure that all employees have the opportunity to read the notice, Respondent must post English and Spanish versions of the notice at every jobsite within the United States and its territories where Respondent's employees perform work during any portion of the notice posting period.

If any jobsite does not have an appropriate place for posting notices, Respondent must mail copies of the notice to all employees working at such jobsite.

Additionally, Respondent must post the notice, in English and Spanish, at its office and place of business in Jacksonville, Florida.

Respondent also must offer employee Colby Lee immediate and full reinstatement to his former position or to substantially equivalent employment if his former position is not available, and make him whole, with interest, for all losses he suffered because of Respondent's unlawful discrimination against him.

Conclusions of Law

1. Respondent, Gulf Coast Rebar, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent is an employer primarily engaged in the building and construction industry within the meaning of Section 8(f) of the Act.

3. The Charging Party, the Iron Workers Regional District Council, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO, and Locals 846 and 847, International Union of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL-CIO (collectively, the Union), are labor organizations within the meaning of Section 2(5) of the Act.

4. Respondent violated Section 8(a)(1) of the Act by the following conduct: Threatening employees with closer than normal supervision and discharge because of their membership in and activities on behalf of the Union; telling employees that Respondent did not recognize the Union and that they could not inform other employees of the identity of the Union steward; telling employees that they should not report grievances about their working conditions to the Union; threatening to engage in a physical altercation with employees and threatening employees with discharge because of their membership in and activities on behalf of the Union; physically assaulting employees because of their membership in and activities on behalf of the Union; falsely reporting to police that employees had committed a physical assault because of the employees' membership in and activities on behalf of the Union; threatening employees with discharge unless they removed union stickers from their hardhats; removing union stickers from employees' hardhats; telling employees that Respondent would not recognize the Union; creating an impression among its employees that their union activities were under surveillance; and threatening employees with discharge and unspecified reprisals if they engaged in union activities.

5. Respondent violated Section 8(a)(1) and (3) of the Act by the following conduct: Discharging employee Colby Lee; after reinstating Colby Lee, isolating him from other employees; by these actions and certain of the 8(a)(1) violations described in paragraph 5, above, causing the termination of employment of Colby Lee.

6. Respondent did not violate the Act in any other manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[15]

ORDER

The Respondent, Gulf Coast Rebar, Inc., Jacksonville, Florida, and at every jobsite at which its employees perform work, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with closer than normal supervision and discharge because of their membership in and activities on behalf of the Union; telling employees that Respondent did not recognize the Union and that they could not inform other employees of the identity of the union steward; telling employees that they should not report grievances about their working conditions to the Union; threatening to engage in a physical altercation with employees and threatening employees with discharge because of their membership in and activities on behalf of the Union; physically assaulting employees because of their membership in and activities on behalf of the Union; falsely reporting to police that employees had committed a physical assault because of the employees' membership in and activities on behalf of the Union; threatening employees with discharge unless they removed union stickers from their hardhats; removing union stickers from employees' hardhats; telling employees that Respondent would not recognize the Union; creating an impression among its employees that their union activities were under surveillance; and threatening employees with discharge and unspecified reprisals if they engaged in union activities.

(b) Isolating any employee from other employees because of that employee's membership in or activities on behalf of a labor organization or other protected, concerted activity or to discourage other employees from engaging in such activity.

(c) Discharging or causing the termination of employment of any employee because of that employee's membership in or activities on behalf of a labor organization or other protected, concerted activity or to discourage other employees from engaging in such activity.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to form, join, or assist any labor organization, to bargain collectively through representatives of their own choosing, or to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Colby Lee immediate and full reinstatement to his former position or to a substantially equivalent position if his former position no longer is available.

(b) Make Colby Lee whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Colby Lee and, within 3 days thereafter, notify in writing that this has been done and that the discharge will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its facilities in Jacksonville, Florida, and at every jobsite at which its employees perform work, at any time during the posting period described below, copies of the attached notice marked "Appendix A."[16] If there is no appropriate place at a jobsite for posting the notice, the Respondent shall mail a copy, at its expense, to each employee working at that jobsite. Copies of the notice, in English and Spanish, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 13, 2015. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps that the Respondent has taken to comply.

[16] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated Washington, D.C., March 4, 2016

Keltner W. Locke
Administrative Law Judge

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of these rights, guaranteed to them by Section 7 of the Act.

WE WILL NOT threaten employees with closer than normal supervision or discharge because of their membership in and activities on behalf of the Union.

WE WILL NOT tell employees that we did not recognize the Union and that they could not inform other employees of the identity of the union steward.

WE WILL NOT tell employees that they should not report grievances about their working conditions to the Union.

WE WILL NOT threaten to engage in a physical altercation with employees or threaten employees with discharge because of their membership in and activities on behalf of the Union.

WE WILL NOT physically assault employees because of their membership in and activities on behalf of the Union.

WE WILL NOT falsely report to police that employees had committed a physical assault because of the employees' membership in and activities on behalf of the Union.

WE WILL NOT threaten employees with discharge unless they removed union stickers from their hardhats.

WE WILL NOT remove union stickers from employees' hardhats.

WE WILL NOT tell employees that Respondent would not recognize the Union.

WE WILL NOT create an impression among employees that their union activities are under surveillance.

WE WILL NOT threaten employees with discharge or unspecified reprisals if they engaged in union activities.

WE WILL NOT isolate any employee from other employees because of that employee's membership in or activities on behalf of a labor organization or other protected, concerted activity or to discourage other employees from engaging in such activity.

WE WILL NOT discharge or cause the termination of employment of any employee because of that employee's membership in or activities on behalf of a labor organization or other protected, concerted activity or to discourage other employees from engaging in such activity.

WE WILL NOT, in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL reinstate employee Colby Lee to his former position or to a substantially equivalent position if his former position is not available.

WE WILL make employee Colby Lee whole, with interest, for all losses he suffered because of our unlawful discrimination against him.

GULF COAST REBAR, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

South Trust Plaza Suite 530, 201 East Kennedy Blvd., Tampa, FL 33602-5824
(813) 228-2641, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-149627 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGINAL OFFICE'S COMPLIANCE OFFICER, (813) 28-2455.